

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 1, 2026

**Christopher M. Wolpert
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN WASHINGTON,

Defendant - Appellant.

No. 25-1349
(D.C. No. 1:24-CR-00173-DDD-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **McHUGH**, **EBEL**, and **KELLY**, Circuit Judges.

Defendant-Appellant Kevin Washington entered a conditional plea of guilty to being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), and was sentenced to six months' imprisonment and three years' supervised release. He now appeals from the district court's denial of his motion to suppress evidence and the denial of his motion to dismiss the indictment on Second Amendment grounds. He argues that law enforcement officers lacked reasonable suspicion to conduct a protective sweep and that § 922(g)(1) is unconstitutional. Our jurisdiction arises under 28 U.S.C. § 1291, and we reverse the denial of the motion to suppress and remand for further proceedings. We affirm the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

denial of the motion to dismiss the indictment on Second Amendment grounds as it is foreclosed by Vincent v. Bondi, 127 F.4th 1263 (10th Cir. 2025), and advanced here for preservation purposes.

Background

On the evening of March 29, 2024, Officers Gergits and Danielson of the Denver Police Department (DPD) were on proactive patrol in a marked patrol car on Denver's West Side. III R. 7–8. Both officers were members of the Special Operations Response Team (SORT), a DPD unit tasked with “investigat[ing] and deter[ing] gang-motivated crimes[.]” Id. at 7, 40–41. Officer Gergits testified that it was a high-crime area that was frequently patrolled. Id. at 8. Around 9:10 p.m., the officers saw a Buick sedan that did not have a license plate affixed to the back of the vehicle, indicating it might be stolen. Id. at 8–9. The officers followed the vehicle to execute a traffic stop, but the vehicle went through a red light. Id. at 9–10. Concerned that the vehicle might flee, the officers requested helicopter support. Id. They then activated their lights and siren, and shortly thereafter the vehicle pulled into a parking spot in a well-lit McDonald's parking lot. Id. at 10, 24. Before exiting the vehicle, the officers noticed a temporary tag in the rear window, rather than on the rear bumper. Id. at 24. Upon running the tag, Officer Gergits learned that the vehicle was not stolen. Id. at 25–26.

The officers exited their patrol car and approached the vehicle with Officer Gergits on the passenger side and Officer Danielson on the driver's side. Id. at 10, 58. Officer Gergits noticed a small child in the backseat and that the driver, later identified as Mr.

Washington, was “wearing a Washington Nationals hat.” Id. at 11. The hat stood out to Officer Gergits because “a lot of individuals associated with gangs on the west side utilize Washington Nationals sports gear to represent their affiliations[.]” information he learned based on interviews with gang members in the area. Id. at 11–12.

Officer Danielson requested Mr. Washington’s documentation, which Mr. Washington produced; he explained that he was taking his infant son home. Ex. 2 at 00:35–01:45. Officer Gergits ran a check on the ID while Officer Danielson made friendly conversation with Mr. Washington, who was polite and compliant with the officers during the initial part of the stop. III R. 13; see Ex. 2 at 00:35–03:30.

Mr. Washington had no active wants or warrants and his driver’s license was valid. III R. 31. However, Officer Gergits learned that Mr. Washington had been arrested for a felony assault/shooting in 2021 and for three other simple assaults. Id. at 13. He also learned that Mr. Washington was a suspect in, but was not arrested for, a concealed carry weapons case from the month before; in that incident, Mr. Washington was in a car with multiple occupants and a handgun had been found near his feet. Id. at 13–14, 33–35.

Based on Mr. Washington’s prior criminal history, his possible gang affiliation, the fact that gang members “are commonly armed[.]” and the stop occurring in an area known for violent crime, Officer Gergits decided to remove Mr. Washington from the vehicle and conduct a frisk of his person and a protective sweep of the car. Id. at 14. Officer Gergits told Officer Danielson, “We can do a sweep, he’s got some history of an arrest for a shooting.” Id.; Ex. 1 at 00:21–00:24. Officer Gergits recovered a firearm in a

diaper bag located behind the center console. II R. 22. The officers then arrested Mr. Washington because he had previously been convicted of a felony.¹ Id.

Mr. Washington moved to suppress the firearm, claiming Officer Gergits lacked reasonable suspicion for the protective sweep. Id. at 4–16, 29–40. The district court held an evidentiary hearing at which Officers Gergits and Danielson testified. III R. 4–120. It issued a written decision finding reasonable suspicion for the sweep and denying the motion to suppress. I R. 72–82.

Discussion

Mr. Washington does not challenge the validity of the traffic stop, the request for his ID, or the records check. Instead, he maintains that the officers lacked reasonable suspicion that he was presently dangerous and had ready access to a firearm, and accordingly that the sweep was unlawful. *Aplt. Br.* at 8–9.

Given a denial of a motion to suppress, we view the evidence in the light most favorable to the government. United States v. Canada, 76 F.4th 1304, 1307 (10th Cir. 2023), cert. denied, 144 S. Ct. 556 (2024) (citation modified). The district court’s factual findings will be upheld unless clearly erroneous, but Fourth Amendment reasonableness is reviewed de novo. Id.

Protective sweeps are an exception to the Fourth Amendment’s prohibition on warrantless searches. Michigan v. Long, 463 U.S. 1032, 1049–51 (1983). To conduct a lawful sweep, an officer “must have reasonable suspicion that a suspect [(1)] poses a

¹ This felony conviction was different from the 2021 assault/shooting felony for which he was arrested. II R. 22.

danger and [(2)] may gain immediate access to a weapon.” Canada, 76 F.4th at 1307. To meet the first element for a protective sweep, the government bears the burden of showing that a reasonable officer would believe the suspect to be “presently dangerous.” Id. (citation modified). To meet the second element, the government must also show that a reasonable officer must “have had reason to believe that weapons may be found in the vehicle.” Id. at 1307–08 (citation modified). The primary inquiry is whether the officers reasonably believed they were in imminent danger. Fishbein ex rel. Fishbein v. City of Glenwood Springs, 469 F.3d 957, 962 (10th Cir. 2006). Reasonable suspicion is “based on the totality of the circumstances, taking into account an officer’s reasonable inferences based on training, experience, and common sense.” United States v. Garcia, 751 F.3d 1139, 1143 (10th Cir. 2014) (citation modified).

The district court found reasonable suspicion based upon several factors: Mr. Washington’s presence and his being stopped in a high crime area at night, his wearing a Washington Nationals hat that “brandish[ed]” his gang affiliation, and the records check, specifically Mr. Washington’s arrest for an assault/shooting and his being a suspect in a recent concealed weapons case. I R. 78–81. In addition, the court commented that stops for relatively minor infractions can turn deadly. Id. at 80 n.7. The court acknowledged other facts militated against reasonable suspicion, including that the officers learned the vehicle was not stolen before approaching it, that Mr. Washington had his infant son in the backseat, that Mr. Washington was cooperative and his conduct was “exemplary[.]” and that the stop occurred along a busy thoroughfare in a well-lit parking lot. Id. at 80 &

nn. 7–8. But it concluded that the sweep was justified given the low bar required for reasonableness and the totality of the circumstances. Id. at 80–81.

For its part, the government argues that Mr. Washington’s prior arrests and involvement in a concealed carry case where a gun was found, his wearing of a red Washington Nationals hat, and the fact that the stop occurred at night in a high-crime area provided reasonable suspicion that Mr. Washington was armed and dangerous. Aplee. Br. at 10–11. It further argues that the mitigating circumstances do not dispel the other circumstances supporting such a finding. Id. at 11–12.

Having carefully reviewed the record, Mr. Washington has the better argument after considering the totality of the circumstances, as we explain below.

A. Mr. Washington’s Criminal History and Purported Gang Affiliation

We begin with Mr. Washington’s criminal history and his purported gang affiliation. Neither criminal history nor gang affiliation can, on their own, support reasonable suspicion, but they can when viewed in conjunction with other factors. United States v. McGregor, 158 F.4th 1082, 1097–99, 1101 (10th Cir. 2025), cert. denied, 146 S. Ct. 1619 (2026); United States v. Hammond, 890 F.3d 901, 906–07 (10th Cir. 2018). In other words, these factors may weigh in the government’s favor if they meaningfully interact with the circumstances of the stop in some way. McGregor, 158 F.4th at 1101. The government argues that such facts were present here, primarily relying upon Hammond and McGregor for support. Aplee. Br. at 16–17, 18–20.

In Hammond, the defendant was a suspect in a prior weapons possession case and had recently been arrested in connection with another weapons case. 890 F.3d at 907–08.

The court found that the defendant's criminal history, together with the fact that the defendant was a known gang member, that he was wearing gang colors that "loudly display[ed] his affiliation with a gang involved in an ongoing feud," and that he was driving a car previously seized in connection with his prior arrest justified a frisk. Id. And in McGregor, the court held that the officers had reasonable suspicion to conduct a protective sweep because the defendant was known to the officers conducting the stop as a member of a local gang, was on parole for robbery, and made a "dramatic, frantic, [and] abrupt" movement that the officers believed "was an attempt to conceal or retrieve something[.]" 158 F.4th at 1104–05 (citation modified).

The facts here are easily distinguishable from McGregor and Hammond. Mr. Washington did not make any furtive movements like the defendant did in McGregor, nor was he on parole for a violent felony. To be sure, Mr. Washington's criminal history does bear some resemblance to that of the defendant's in Hammond. But as explained, there were several other circumstances of the stop that the court found interacted with the defendant's criminal history to justify the frisk.

The government argues that Mr. Washington's criminal history and his purported gang affiliation both interacted with each other to make them significant factors in the reasonableness calculus. We disagree. Even accepting the district court's factual findings regarding Mr. Washington's hat, the evidence of suspected gang affiliation is exceptionally weak. To be sure, the hat could have indicated gang affiliation, but the facts hardly support the district court's finding that Mr. Washington wore it to "brandish his affiliation with a gang in that . . . area." I R. 81. At best, he was wearing a hat known

to the officers as “commonly worn by gang members on the west side of the city.” III R. 45.² But merely wearing “one article of clothing that is not an unusual color but happens also to be the color of choice for a gang” is not a reasonably objective basis to conclude the defendant is affiliated with a gang. United States v. McKinney, 980 F.3d 485, 492–93 (5th Cir. 2020). Mr. Washington was not already known to the officers as a member of a gang or identified in a police database as being a member of a gang. See McGregor, 158 F.4th at 1099–1100. Nor was he “wearing colors which loudly display[ed] his affiliation with a gang involved in an ongoing feud[.]” Hammond, 890 F.3d at 904, 907–08.

The government leans heavily on the deference we give officers’ training and experience in identifying gang threats and their ability to discern suspicious facts from innocent ones. Aplee. Br. at 20; see, e.g., McGregor, 158 F.4th at 1091. “[W]hile we defer to all reasonable inferences made by law enforcement in light of their knowledge and professional experience distinguishing between innocent and suspicious actions, that deference is not unlimited.” United States v. Huerta, 166 F.4th 866, 875 (10th Cir. 2025) (citation modified). Ultimately, the court must determine the objective reasonableness of the search based upon the facts of the stop. See Canada, 76 F.4th at 1308. And we have

² Officer Danielson noticed Mr. Washington’s hat had “LL Polo DaGeneral” embroidered on it, which he believed was further evidence of gang affiliation. III R. 46–47. The district court found that Officer Gergits did not see the embroidery on Mr. Washington’s hat before running a records check and accordingly did not consider it in its reasonable suspicion analysis. I R. 78 & n.5. The government does not take issue with that conclusion on appeal. See Aplee. Br. at 17–20. Therefore, we do not consider the embroidery in our analysis.

cautioned that other facts must link seemingly innocuous behavior to reasonable suspicion. See United States v. Wood, 106 F.3d 942, 948 (10th Cir. 1997). Those are lacking here. Therefore, we find Mr. Washington’s criminal history and purported gang affiliation to be of minimal significance to the reasonable suspicion analysis.

B. Setting of the Stop

The government also argues that the timing and location of the stop are relevant, pointing to the officers’ testimony that the area was known for violent and gang-related crime and the fact that the stop took place at night. *Aplee*. Br. at 20–21. The timing and location of a stop may well be relevant to reasonable suspicion, but they are insufficient on their own. United States v. Raban, 162 F.4th 1223, 1232–34 (10th Cir. 2025).

Although the stop occurred at night, it occurred at 9:00 p.m. *III R.* 7–9. Moreover, Mr. Washington was traveling along a busy thoroughfare, and the stop itself occurred in a well-lit parking lot of a McDonald’s that was actively being visited by customers. *Id.* at 42; *Ex. 2* at 08:45–08:55; see Huerta, 166 F.4th at 878. The stop did not take place, for example, in the middle of the night in a poorly lit parking lot known for car thefts. See United States v. Dennison, 410 F.3d 1203, 1208, 1214 (10th Cir. 2005). Nor was Mr. Washington stopped while traveling through rival gang territory. Raban, 162 F.4th at 1233. Once again, we fail to see how the other circumstances of the stop meaningfully interact with the timing and location of it to make those facts relevant to our analysis here.

C. Other Factors

Other factors also support Mr. Washington's position. As acknowledged by the district court, Mr. Washington's behavior was "exemplary," as he was polite and compliant with the officers for the duration of the stop. I R. 80 & n.7. He made no furtive movements suggesting he was attempting to hide or conceal a firearm or other contraband. See id. The officers outnumbered Mr. Washington, and any suspicion about the vehicle being stolen had dissipated by the time they exited their vehicle. Id. at 80; see Dennison, 410 F.3d at 1214. And he was traveling with his infant son in the backseat. I R. 80. We find that each of these facts weighs against a finding that Mr. Washington was armed and dangerous.

Based on the foregoing, we conclude that, when viewing the facts in their totality, and even when viewing them in the light most favorable to the government, they do not rise to the "minimum level of objective justification" necessary to justify the stop. Garcia, 751 F.3d at 1143 (citation modified). Stated another way, given how the search unfolded, we find that the low bar for reasonableness was not met.

Accordingly, we REVERSE the district court's denial of Mr. Washington's motion to suppress and REMAND for further proceedings consistent with this order and

judgment. We AFFIRM the district court's denial of his motion to dismiss the indictment.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge